IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 12/08/2002

Coram

The Honourable Mr.Justice M. KARPAGAVINAYAGAM

SECOND APPEAL No.1737 of 1990

S. Ganesan ..Appellant

-Vs-

1. S. Issac (deceased)
2. M.S. Devadasan
3. J. Jebamani
4. R. Ebanesar
5. R. Selvaraj
6. I. Prema
7. I. Violet Jebamani
8. Mallika
9. I. Jayaseelan
10. I. Jesudoss

RR3 to 10 brought on record as
L.Rs. of the deceased lst respondents
as per order dt.27.6.2002 in C.M.P.Nos.
13377 and 13378 of 1997. ..Respondents

Second Appeal against the judgment and decree dated 26.7.1989 in A. S.No.22 of 1989 on the file of the I Addl. Sub Court, Madurai confirming the judgment and decree dated 21.7.1986 in O.S.No.1357 of 1982 on the file of the Principal District Munsif, Madurai.

!For Appellant : Mr.T.L. Ram Mohan, S.C. for
Mr. P.Ananthakrishnan Nair

^For Respondents : Mr. T.Srinivasaraghavan
3 to 10

:J U D G M E N T

Ganesan, the plaintiff is the appellant herein. He filed the suit for partition and separate possession. The suit was dismissed by the trial Court. Aggrieved by the same, he filed an appeal before the lower appellate Court, which in turn dismissed the same confirming the decree passed by the trial Court. Hence, the second appeal.

2. The case of the plaintiff is as follows:
"The suit property and the property at Kulamangalam village originally belonged to one James Chelliah. James Chelliah had two wives. The first wife is Arputham. Ganesan, the plaintiff married the daughter of one Janarthanam, the brother of Arputham, the first wife of James Chelliah. His second wife's name is Jesumani Ammal. Issac and Devadasan, the defendants in the present suit are the brothers of the said Jesumani Ammal. On 25.3.1966 James Chelliah executed a Will bequeathing one half of his share to the plaintiff and allotting the other half to his second wife Jesumani Ammal. He died on 16.2.1968. Thereafter, Jesumani Ammal executed a Will bequeathing her share in favour of the second defendant. After the death of Jesumani Ammal, Devadasan, the second defendant filed a suit for partition in respect of the properties bequeathed in his favour. Ultimately, the Civil Court concluded that the Will executed by Jesumani Ammal is not a valid one and the Will executed by James Chelliah is the only valid and true document. So, under the Will executed by James Chelliah, the plaintiff would be entitled to half share in the suit schedule property, namely house at Madurai. Since the suit property is in possession and enjoyment of the first defendant, the plaintiff filed the suit against both the defendants."

3. The case of the first defendant is as follows:
"The suit property belonged to James Chelliah. Earlier, both Ganesan, the plaintiff and Devadasan, the second defendant filed separate suits on the basis of the Will and the plaintiff obtained the decree in respect of half of the share in Kulamangalam properties in the said suit. Since the plaintiff did not claim any share in the suit property situate at Madurai, he is barred from claiming share now under Order 2, Rule 2 read with Section 11(4) C.P.C. Hence, the suit is liable to be dismissed."

4. As far as the second defendant is concerned, since despite service of summons, he did not choose to appear, he was set ex parte.

5. On the basis of the pleadings of the respective parties, the necessary issues were framed by the trial Court. During the course of trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and marked Exs.A1 to A10. On the other side, the first defendant examined himself as D.W.1 and marked Exs.B1 to B5.

6. On consideration of the evidence on record, the trial Court dismissed the suit mainly on the ground that the suit is not maintainable in view of the bar contemplated under Order 2, Rule 2 read with Section 11(4) of C.P.C. Confirming the said finding, the lower appellate Court as well dismissed the appeal. Hence, this second appeal.

7. At the time of admission, the following substantial questions of law have been formulated by this Court by the order dated 29.1.1991:
1) Whether the trial Court and the first appellate Court are right in holding that the present suit is barred by Order II Rule 2 of the Code of Civil Procedure, in view of the judgments in A.S.Nos.44 of 197 8 and 94 of 1978 on the file of the Sub Court Madurai?
2) Whether the trial Court and first appellate Court are correct in

applying the principles laid down in BASAVANNA vs. DODDALINGAPPA (A.I.R. 1928 Madras 584) to the facts of the present case?

8. In elaboration of these substantial questions of law, it is vehemently contended by Mr.Ram Mohan,the learned senior counsel appearing for the appellant, that the finding given by both the Courts below with reference to the bar under Order 2, Rule 2 read with Section 11 (4) C.P.C. is wrong and perverse, inasmuch as the facts of the present case would not attract the above provisions placing the bar for filing a fresh suit. He would cite a number of authorities and also point out various features of the facts of this case in order to show that the judgments relied upon by both the Courts below for holding that bar under Order 2, Rule 2 will apply to the present facts of the case, are not applicable.

9. Refuting this submission, the counsel for the respondent would contend that the reasonings given by both the Courts below for dismissing the suit are perfectly justified as the present facts of the case would attract the prohibition of the entertainment of the fresh suit in respect of same cause of action as provided under Order 2, Rule 2 C.P.C. He has also cited several autho rities.

10. Before dealing with the questions of law raised in this case, it would be appropriate, at this stage, to refer to the facts, which are not in dispute.

11. The suit property at Madurai and the property at Kulamangalam originally belonged to one James Chelliah. The plaintiff has married the daughter of the brother-in-law of James Chelliah. After the death of Arputham, the first wife, James Chelliah married Jesumani Ammal as second wife. The defendants Issac and Devadasan are the brothers of the said Jesumani Ammal. James Chelliah died on 16.2.1968 leaving a Will dated 25.3.1966. Under the Will, one half of the suit property along with the property at Kulamangalam was given to the plaintiff and the other half to Jesumani Ammal. Devadasan, the second defendant filed a suit in O.S.No.380 of 1972 against plaintiff Ganesan and first defendant Issac and others for partition and separate possession in respect of number of properties inclusive of the suit item on the basis of the Will stated to have been executed by Jesumani Ammal in his favour.

12. In that suit, the plaintiff was shown as second defendant. He filed written statement claiming half share as in the present suit. Pending that suit, the plaintiff filed another suit in O.S.No.400 of 1 973 which was renumbered as O.S.No.106 of 1974. Both the suits were tried together by Sub Court, Madurai. The first defendant herein who was one of the defendants in the earlier suits disputed both the Wills executed by James Chelliah and Jesumani Ammal and pleaded a third Will in his favour executed by Jesumani Ammal.

13. On conclusion of trial, the trial Court upheld the Will of James Chelliah and rejected the other Will and decreed the suit of the second defendant Devadasan in O.S.No.380 of 1972 granting half share in items 1 and 2

of the 'A' Schedule property, namely house and land. Issac, one of the defendants in the other suit, filed A.S.Nos.44 of 19 78 and 94 of 1978 against the decree passed in the said suit. The appellate Court after hearing the counsel for parties allowed A.S.No.94 of 1978 setting aside the decree in favour of Devadasan and dismissed A.S.No.44 of 1978 by upholding the Will of James Chelliah observing that the claim put forth by the second defendant in O.S.No.380 of 19 72 can be decided only in a fresh suit for partition by impleading all legal heirs of Jesumani Ammal. Issac, the first defendant filed second appeal in S.A.No.1167 of 1979 against A.S.No.44 of 1978 in respect of the land alone, however, the same was dismissed by the High Court.

14. The above facts would indicate that the second defendant Devadasan, the plaintiff in O.S.No.380 of 1972 was permitted to file the suit in a properly framed suit for partition and in the written statement filed by the plaintiff herein in O.S.No.380 of 1972, the plaintiff claimed half share in the present suit house at Madurai, though he had not claimed the same in his suit in O.S.No.400 of 1973 which was renumbered as O.S.No.106 of 1974.

15. One other special feature to be noticed is that in the suit in O.S.No.106 of 1974 filed by Ganesan, the plaintiff herein, Issac, the first defendant herein and one Ramaswamy alone were the parties. Devadasan, the second defendant was not the party. However, in the other suit in O.S.No.380 of 1972, the second defendant Devadasan was the plaintiff. Issac, the first defendant and Ganesan, the present plaintiff and five others were impleaded as defendants 1 to 7.

16. It has to be remembered in this context that the claim made by the plaintiff for the partition in respect of Kulamangalam properties, Devadasan, the second defendant herein was not the party. Though the plaintiff was the party in O.S.No.380 of 1972 filed by Devadasan who is the present second defendant, a written statement has been filed by the plaintiff as the second defendant therein claiming half share in the present suit house.

17. In the light of the above facts, let us now come to the substantial questions of law formulated by this Court.

18. The main defence of the contesting first defendant is that the suit is barred by Order 2, Rule 2 C.P.C., since the plaintiff omitted to sue for the partition of the house property at Madurai in earlier suit in O.S.No.106 of 1974. So, both the substantial questions of law would give rise to the question whether the Courts below erred in law in holding that the present suit is barred by Order 2 Rule 2 read with Section 11(1), in view of the judgments in earlier proceedings in A.S.Nos.44 of 1978 and 94 of 1978?

19. The Order 2, Rule 2 C.P.C. provide thus:
"Suit to include the whole claim.--(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
(2) Relinquishment of part of claim.--Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he

shall not afterwards sue in respect of the portion so omitted or relinquished.
(3) Omission to sue for one of several reliefs.--A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

20. The reading of the above provisions would indicate that the property embodied in Order 2, Rule 2 C..C. is that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. The plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If the plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not be entitled to sue afterwards in respect of the portion so omitted or relinquished without obtaining leave of the Court for the same.

21. In order that a plea of the bar under Order 2, Rule 2(3) C.P.C. should succeed, the defendant who raised the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed; (4) that the cause of action and the parties to the second suit shall be the same as in the first suit.

22. From this analysis, it would be seen that the defendant would have to establish primarily the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit on the same party is based, there would be no scope for the application of the bar.

23. As the plea is a technical bar, it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning. In other words, the plea of a bar under Order 2, Rule 2 C.P.C. can be established only if the defendant files in evidence the pleadings of the previous suit and thereby proves to the Court the identity of the cause of action as well as the identity of the parties in the two suits.

24. As has been held by this Court as well as the other Courts, it has to be remembered that the plea of bar of suit based on Order 2, Rule 2 is a highly technical plea. It tends to defeat justice and deprive the party of his or her legitimate right. Therefore, care must be taken to see that the complete identity of cause of action is established.

25. These principles have been laid down in RAMASAMY v. ALAGATHAI ANNI (A.I.R.1929 Madras 96), M. THIMMA RAJU v. D.V. RAO (A.I.R.1978 ANDHRA PRADESH 385) and NARASHALLI KEMPANNA v. NARASAPPA (A.I.R.1 989 KARNATAKA 50).

26. In the light of the above principles, if we look at the facts of the present case, it shall be held that the contentions urged by the senior counsel for the appellant on the strength of the substantial questions of law, have to be accepted.

27. As indicated above, in the earlier suit in O.S.No.400 of 1973 which was renumbered as O.S.No.106 of 1974 filed by the plaintiff, the first defendant Issac and one Ramaswamy, the tenant were the defendants. The second defendant Devadasan who is the brother of the first defendant and who is also a co-sharer was not a party to the suit.

28. As mentioned above, Order 2, Rule 2 C.P.C. can be invoked only if the plaintiff has omitted to pray for the relief in the earlier suit. But, in the suit filed by the second defendant Devadasan in O.S. No.380 of 1972 in respect of the suit house, the plaintiff as second defendant through his written statement claimed half share in the house property. Furthermore, in the appeal filed by the first defendant against the decree of the suit filed by Devadasan, the Appellate Judge directed the said Devadasan to file a separate suit in respect of the house property.

29. As per the dictum laid down in A.I.R.1989 KARNATAKA 50 (supra), this may amount to grant of leave granted by the Court to one of the parties. As such, it can be held that this will give rise to a fresh cause of action for the parties to approach.

30. The judgments relied upon by both the Courts below in BASAVANA v. DODDALINGAPPA (A.I.R.1923 Madras 584) and NAGESHAR TEWARI v. DWARKA PRASAD (A.I.R.1953 ALL. 541) would not apply to the present case, as the parties were members of joint family and the claim is not as joint tenants as co-parceners, but as tenants as common.

31. As noted above, it is held in A.I.R.1978 ANDHRA PRADESH 385 (supra) as follows:
"O.2 R.2 C.P.C. is based on the principle that the defenants should not be twice vexed for one and the same cause. The rule is directed against two evils, the splitting of claims and the splitting of remedies. It provides if a plaintiff omits any portion of the claim, which he is entitled to make or any of the remedies which he is entitled to claim in respect of the cause of action for his suit, he shall not thereafter sue for the portion claimed or for the remedy so omitted. The rule does not preclude a second suit based on a distinct and separate cause of action. In order to invoke the rule, two conditions must be satisfied; first, that the previous suit and the present suit must arise out of the same cause of action and secondly, they must be between the same parties."

32. In A.I.R.1929 MADRAS 96 (supra), it has been held thus:
"O.2, R.2 of the present Code, had no application where the parties to the suits are not the same."

In the light of the above facts and the legal position, I am of the view that the judgment and decree passed by both the Courts below holding that the bar under Order 2, Rule 2 read with Section 11(4) C.P.C. would apply to the present case is clearly wrong and out of misapplication of the wrong law and facts.

33. Therefore, the plaintiff is entitled to the decree as prayed for. Thus, the second appeal is allowed. No costs.

12-08-2002
Index: Yes
Internet: Yes
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To
1) The I Addl. Subordinate Judge, Madurai.
2) The Principal District Munsif, Madurai.

M. KARPAGAVINAYAGAM, J.
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Judgment in
S.A.No.1737 of 1990